



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2022/23189

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES

29/5/2023
DATE

J Moorcroft
SIGNATURE

In the matter between –

FLEXI FUEL LOGISTICS (PTY) LTD

APPLICANT

and

NEDBANK LTD

FIRST RESPONDENT

FIRSTRAND BANK LTD

SECOND RESPONDENT

Y&N HOLDINGS (PTY) LTD

THIRD RESPONDENT

Neutral Citation: *Flexi Fuel Logistics (Pty) Ltd v Nedbank Ltd and Others* (Case No. 2022/23189) [2023] ZAGPJHC 586 (29 May 2023)

JUDGMENT

MOORCROFT AJ:Summary

Unjustified enrichment – bank not enriched when customer's debtor pays a debt due to bank's customer into bank customer's account and customer is credited with the payment. When the money received is set off against the bank's claim against its customer, bank is similarly not enriched as its claim against its customer is reduced by the amount of the payment

Order

[1] I make the following order:

1. *The application is dismissed;*
2. *The applicant is ordered to pay the costs.*

[2] The reasons for the order follow below.

Introduction

[3] The applicant purchased fuel and related products from the third respondent, Y&N, over a number of years. Until about 2019 when Y&N furnished the applicant with new bank account details of a bank account at FNB the applicant settled Y&N's invoices by transferring funds from its own bank account into Y&N's Nedbank account.. Both these bank accounts used by Y&N were loaded onto the FNB banking portals used by the applicant.

[4] On occasion Y&N would request the applicant to effect payment into its Nedbank account but in the recent past most payments were made into the FNB account.

The relevant payment

[5] During March 2022 Y&N sold fuel to the applicant and issued two invoices reflecting the FNB bank account as the account for payment. When the deponent to the founding affidavit paid these invoices using the FNB banking portal, an amount was paid into the FNB account but the applicant had reached its daily limit for payments on this portal. She then logged onto the FNB's Enterprise banking portal that had no maximum limit in order to pay the balance due to Y&N. She selected Y&N from the list of preloaded beneficiaries and paid over the amount of R1 117 649.60 to Y&N. Without giving it any thought she selected the Y&N preloaded beneficiary with the Nedbank banking details as opposed to the one preloaded with the FNB banking details.

[6] When the deponent gave the requisite instruction on the banking portal and made the payment to the preselected beneficiary, a number of things happened:

- 6.1 The applicant's bank (which also happened to be FNB) accepted the instruction and paid the funds into the Y&N Nedbank account. The applicant's FNB account was debited with the equivalent amount.
- 6.2 Money is *res fungibiles* and ownership of the money passed to Nedbank by *commixtio*. In *Trustees, Estate Whitehead v Dumas and Another*¹ Cachalia JA put it thus:

"[13] Generally, where money is deposited into a bank account of an account-holder it mixes with other money and, by virtue of commixtio, becomes the property of the bank regardless of the circumstances in which the deposit was made or by whom it was made. The account-holder has no real right of ownership of the money standing to his credit but acquires a personal right to payment of that amount from the bank, arising from their bank-customer relationship. This is also so where, as in this case, no money in its physical form is in issue, and the payment by one bank to another, on a client's instruction, is no more than an entry in the receiving bank's account. The bank's

¹ *Trustees, Estate Whitehead v Dumas and Another* 2013 (3) SA 331 (SCA).

obligation, as owner of the funds credited to the customer's account, is to honour the customer's payment instructions. Where the depositor is not the account-holder he relinquishes any right to the money and cannot reverse the transfer without the account-holder's concurrence." [footnotes omitted]

- 6.3 The money paid into the account could therefore not be claimed with the *rei vindictio*.²
- 6.4 Y&N's account with Nedbank was credited with the amount and therefore the payment benefitted Y&N.
- 6.5 However, the account was overdrawn and set off was applied.
- 6.6 Nedbank became entitled to the amount and simultaneously its claim against Y&N was diminished in the exact same amount.

[7] Had the account been in credit Y&N would have been able to exercise its personal right against Nedbank and could have instructed Nedbank to repay the same amount to the applicant, but because the account was overdrawn Y&N could not do so. A comparable situation arises when a thief (not a debtor as in the current situation) pays his own or someone else's debt with stolen money. The debt is extinguished provided the creditor is innocent. Any amount that remains in credit can be claimed by the victim of the theft, and the victim has a claim against the thief.³

[8] The most basic relationship between bank and customer is a debtor – creditor relationship.⁴ When the account is in credit the customer is the creditor and the bank is the debtor; when the account is overdrawn the bank is the creditor and the customer is the debtor. Because it was the debtor in the relationship Y&N could not repay the money to the applicant.

[9] The payment was not made *indebite*, nor was it made *sine causa*, nor was Nedbank enriched. The money was due to the recipient, Y&N, and the *causa* for the payment was the undisputed debt owed by the applicant to Y&N. None of the *condictiones* are applicable and

² *First National Bank of Southern Africa v Perry NO and Others* 2001 (3) SA 960 (SCA).

³ *Absa Bank Ltd v Moore and Another* 2017 (1) SA 255 (CC) para 35.

⁴ The authorities are summarised in Moorcroft and Vessio *Banking Law and Practice* para 15.4.

the question of which *condictio* applies, does not arise for decision in this case.

Events subsequent to the payment

[10] After making the payment the deponent received a telephone call from a Director of Y&N who informed her that the money had been paid into the Y&N Nedbank account which was no longer in use. He said it had lain dormant since about 2019.

[11] She then immediately logged back onto the FNB Enterprise Banking portal and effected a further payment of R1 117 649.60 from the applicant's FNB account into Y&N's FNB account. The debt was therefore paid for a second time.

[12] It is alleged in the founding affidavit that Y&N's account at Nedbank, the first respondent, had been closed and that the funds had thus not been credited to Y&N. The source of this information seems to be Y&N. It is alleged that Nedbank had neither paid over these funds to Y&N nor has it returned same to either FNB or the applicant. It has simply retained the funds – ostensibly for itself. It is then alleged that Nedbank has no lawful basis to retain the funds and that Nedbank has been unjustly enriched in the amount of R1 117 649.60.

[13] The applicant seeks relief only against Nedbank for repayment of the funds transferred. No relief is sought against the second respondent, FirstRand Bank Limited, referred to as "FNB" or against Y&N.

Nedbank's response

[14] Nedbank states that the factual basis for the application is incorrect.⁵ The Nedbank

⁵ The application must be approached on the basis set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634 and *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) 235E – G, *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* 1976 (2) SA 930 (A) 938A – B, and various other authorities.

account was never closed and was not dormant at the time that the applicant paid money into it. When the applicant refers to the account being dormant, it is probably referring to an account that is open but not used. Nedbank denies that it merely appropriated the applicant's money and states that the amount received into the Y&N bank account was indeed credited to Y&N, thus diminishing the amount that the account was in overdraft. It is also noteworthy that Y&N's director knew that the funds had been paid into the Y&N Nedbank account, a statement impossible to reconcile with the averment that the account was closed and that Nedbank had merely appropriated the money.

[15] The fact that the account is open and not closed is also borne out by the fact that the applicant was able to make a payment into the account on the banking portal. If there was no account or the account had indeed been closed, funds received by Nedbank would have been placed in a suspense account and ultimately returned to FNB.

[16] The account is the subject of a dispute between Nedbank and Y&N presently before the High Court in Durban. Nedbank alleges that the account is substantially overdrawn in excess of the amount paid by the applicant. Y&N had an overdraft facility with Nedbank and the standard conditions provided that in the event of default (including the account being overdrawn), Nedbank was contractually entitled to set off the indebtedness of Y&N to Nedbank. This is what Nedbank did.

[17] Y&N and Nedbank also entered into a "Deed of Pledge and Cession."

[18] The applicant approach the two banks and because of the query raised by the applicant, Nedbank flagged the incident as a possible fraud and the money was held in a suspense account for a period.

[19] The argument that set off could not take place because the money was placed in a suspense account is incorrect. Set off takes place automatically and the set off between the money received on behalf of Y&N and the debt owed by Y&N to Nedbank took place immediately when the funds were deposited. A bank's right to apply set off is well established.⁶

[20] Placing the funds in a suspense account later is immaterial to the question of set off but

⁶ Fourie *The Banker and the Law* 101; *Duba and Others v Ketsikili and Others* 1924 EDL 332 341; *ABSA Bank Ltd v Intensive Air (Pty) Ltd* [2011] 3 All SA 2 (SCA); 2011 (2) SA 275 (SCA) para 20.

rather a banking or an accounting practice to hold funds in a suspense account when allegations of fraud were made.

[21] The payment of the funds into Y&N's Nedbank account reduced the indebtedness of Y&N to Nedbank, did not enrich Nedbank, and benefited Y&N. If any party were enriched, it would appear that Y&N was enriched and the applicant impoverished. Reading the correspondence between the applicant and Y&N attached to the founding affidavit, it is apparent that Y&N did not make a full disclosure of the relationship between itself and Nedbank to the applicant. Had a full disclosure been made before the applicant made the second payment into Y&N's FNB account, the applicant might have taken a different decision about the second payment. Y&N would have known about the overdraft, the fact that the facility had been revoked, the pending litigation and that the account was not closed.

[22] The averment by the applicant that the funds were "*simply lying in Nedbank's own account*" is therefore wrong. It is also incorrect to say as the applicant does that Y&N's Nedbank account was "*no longer accessible*." The account was clearly accessible and the money was paid into it by the applicant.

[23] It is therefore not clear on what basis Y&N purported to instruct that the funds be returned to the applicant under circumstances where the money had been received by it in its own bank account, stood to its benefit as a credit on its account, and had been set off against the debt Y&N owed to Nedbank. Y&N was not in a position to issue instructions to Nedbank. It was the debtor, not the creditor in the relationship.

[24] The applicant confuses the cancellation of the overdraft facility by Nedbank with the termination of the debtor-creditor relationship. All that the cancellation of the facility means is that the credit thereby extended was now revoked. It did not terminate the debtor-creditor relationship and the debt still existed, and the termination of the facility did not mean that Nedbank could no longer rely on set off.

[25] If it eventually turned out that Y&N is not indebted to Nedbank on overdraft, the money paid into the account will still stand to the credit of Y&N on Nedbank's books. This dispute between Nedbank and Y&N has nothing to do with the present dispute between Nedbank and the applicant.

[26] The applicant relied in argument on the decision by the Supreme Court of Appeal in *FirstRand Bank Ltd v Spar Group Ltd*⁷ for two conclusions, namely that there is no inflexible rule that only an account holder may assert a claim to money held in the account holder's account with the bank,⁸ and the fact that the proposition that money deposited in bank account becomes the property of the bank does not necessarily militate against a legitimate claim by another party. These two conclusions are correct and this is borne out by the SCA judgment, but there are of no application in this matter.

[27] In the *Spar* matter a franchisee defaulted on terms of a franchise agreement and the parties came to an arrangement whereby the franchise business would be run by the franchisor at its own cost and for its own benefit. Credit card payments continued to be made into the franchisee's bank accounts and the franchisor's attempts to have the matter rectified with the franchisee and the bank were unsuccessful. The bank thereupon used the funds so deposited from the business operated by the franchisor to set off amounts owed to it by the franchisee and also permitted the controlling mind behind the franchisee to withdraw funds from the accounts. They did this despite the fact that both the bank and the franchisee were at all times aware of the franchisor's claim to the funds.

[28] Sutherland AJA and Unterhalter AJA⁹ held that it was possible that the personal right to the credit arising from the deposits may form the subject of an agreement between the bank, the customer (the franchisee) and the third party depositor (the franchisor) in terms of which there is an obligation on the bank to pay the credit accruing in the account to the franchisor. In such circumstances set off would not operate.¹⁰

[29] In the absence of an agreement between the three parties, the knowledge of the bank that the franchisor has deposited money into their client's account to which their client has no claim may also give a right to the franchisor to payment of the money.¹¹ It is incorrect to interpret *Joint Stock Co Varvarinskoye v Absa Bank Ltd and Others*¹² to mean that "agreement" and "knowledge" were used interchangeably. Even in the absence of agreement, knowledge may have the effect that the third party depositor becomes entitled to the funds.

⁷ *FirstRand Bank Ltd v Spar Group Ltd* [2021] All SA 680 (SCA); 2021 (5) SA 511 (SCA).

⁸ See also *Symon v Brecker* 1904 TS 745 and *ABSA Bank Ltd v Intensive Air (Pty) Ltd* [2011] 3 All SA 2 (SCA); 2011 (2) SA 275 (SCA) para 24.

⁹ Cachalia JA, Dambuza JA and Makgoka JA concurring.

¹⁰ Para 43 of *Spar*.

¹¹ Para 45 of *Spar*.

¹² *Joint Stock Co Varvarinskoye v Absa Bank Ltd and Others* 2008 (4) SA 287 (SCA)

Where a bank owes a personal obligation to the third party to pay the credit balance accruing from the third party's deposits, the bank cannot set off its own customer's indebtedness to the bank against the bank's debt that is due to the third party. The Court therefore interpreted the *Joint Stock* case to mean that the bank's knowledge of the entitlement of the third party to the funds may give rise to a right enjoyed by the third party to payment from the bank.

[30] The franchisee had no right to claim the amounts deposited by the franchisor and set off could not operate between the bank and the franchisee. The same would happen if a payment is made in error: If party A wishing to pay party B paid the money into party C's account, party C has no entitlement to the funds credited to his account and any appropriation of the funds by party B with knowledge that they were not entitled to deal with the funds, would amount to theft.¹³

[31] It was argued on behalf of the applicant that Nedbank explicitly renounced any entitlement to the money and therefore has no liability to its customer. There is no factual basis to find that Nedbank explicitly renounced any entitlement to the money. The money came into Y&N's account and was dealt with as such.

[32] In *Nissan South Africa (Pty) Ltd v Marnitz NO & Others*,¹⁴ the appellant paid an amount of money into the account of a third party and the account was duly credited. The third party was not entitled to the funds and the third party had no claim against the bank in respect of the funds. It was accepted that if the account holder had no claim, then the appellant who had made the error was entitled to payment.

[33] Reference was also made to the decision in *First National Bank of Southern Africa Ltd v Perry NO and Others*¹⁵ where a bank was not entitled to make payment to its own client because the deposited funds were stolen funds. The bank was therefore enriched and an enrichment action lay against it.¹⁶ Thus whether the funds deposited were stolen or deposited in error, the account holder who was credited has no claim against the bank for the reasons set out. In the *Spar* case and the *Joint Stock* case the funds deposited were neither stolen nor deposited in error but were deposited pursuant to an arrangement between the bank's customer (the franchisee) and the third party (the franchisor) with the knowledge of the bank.

¹³ Para 48 of *Spar*.

¹⁴ *Nissan South Africa (Pty) Ltd v Marnitz NO & Others* 2005 (1) SA 441 (SCA).

¹⁵ *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA)

¹⁶ Para 61 of *Spar*.

Under any of these sets of circumstances the account holder had no claim to the money.¹⁷

[34] In the present case the funds meant for Y&N were deposited into Y&N's account and the bank did have a duty or a liability to its customer, and in fulfilment of that duty, it credited its customer's account. Had the credit meant that the account itself was now in credit, Y&N would have been able to deal with the money as it pleased and could have repaid the amount in credit to the applicant. Y&N did, after all, receive payment for the same debt from the applicant twice.

[35] I therefore make the order in paragraph 1 above.


J MOORCROFT

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **29 MAY 2023**.

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(Heads of argument by P J Wallis SC)

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¹⁷ Set off means after all that a debt owed by party A to party B is set off against a debt owed by party B to party A.

Martini – Patlansky Attorneys
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DATE OF THE HEARING:

22 MAY 2023

DATE OF JUDGMENT:

29 MAY 2023